IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 2 [illegible]

RAILWAY EXPRESS AGENCY, INC.,

Petitioner,

against

W. R. GRACE & CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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RAILWAY EXPRESS AGENCY, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, defendant in the Supreme Court of the State of New York, prays that a writ of certiorari be issued to review the judgment of the Court of Appeals of the State of New York, dated and entered June 17, 1960, which affirmed an order of the Appellate Division First Department of the State of New York, affirming and modifying a judgment entered in the Supreme Court, New York County, State of New York, on January 7, 1959. The latter judgment was entered after trial. The trial court awarded respondent the sum of $50.00, the value declared by it as the

released value of the property and shown in the Uniform Express Receipt issued by petitioner, with costs to petitioner, and judgment was entered accordingly. The Appellate Division First Department, State of New York modified this judgment by increasing the amount of $50.00 to $56,117.72. Judgment was entered accordingly for the sum of $70,880.99, which sum includes interest and costs.

Opinions Below.

The opinion, the dissenting opinion and the memorandum concurring in the dissenting opinion of the Court of Appeals of the State of New York are appended hereto (Appendix A, pages A-1 to A-6). The opinion of the trial court has been officially reported in 17 Misc. 2nd, 992, 182 N. Y. S. 2nd 694. The opinion of the Appellate Division, First Department of the State of New York has been officially reported in 9 A. D. 2nd 425, 193 N. Y. S. 2nd 780. The opinion of the Court of Appeals of the State of New York has not been officially reported.

Jurisdiction.

The jurisdiction of this court is invoked under Title 28 U. S. C. Section 1254(1) and Title 28 U. S. C. Section 2104 on the following grounds:

(1) The Court of Appeals of the State of New York has decided an important question of federal law under the Interstate Commerce Act which should be settled by this court.

(2) The Court of Appeals of the State of New York has decided a federal question in a way in conflict with the applicable decisions of this court, and has departed from

the accepted and usual course of judicial review so as to call for an exercise of this court's power of supervision. The decision of the Court of Appeals of the State of New York affects all of the common carriers in the United States engaged in interstate commerce, subject to the provisions of the Interstate Commerce Act and subject to the jurisdiction of the Interstate Commerce Commission.

(3) Your petitioner expressly avers that in and by said action at law, so instituted by the respondent, there was especially set up and claimed by your petitioner in its special plea, and otherwise, a title, right, privilege or immunity, under a Statute of the United States, and authority exercised under the United States and especially under the Act of Congress, approved August 9, 1916, 39 Stat. 441 (Title 49 U. S. C. Sec. 20(11)), and known as the "Second Cummins Amendment" to the Interstate Commerce Act. The final decision and judgment of the Court of Appeals of the State of New York is against the title, right, privilege or immunity, and the authority exercised under the United States, so set up or claimed by your petitioner and said Court being the highest Court of said State in which a decision could be had.

A certified copy of the entire transcript of the record of said cause in which said final judgment was entered, as aforesaid, including the proceeding in said Court of Appeals of the State of New York, is presented herewith as a part of this petition.

Questions Presented for Review.

1. Where a shipper has contracted for transportation service at a rate dependent upon the released valuation of the shipment, may that shipper after the shipment has been lost, repudiate the contract and secure the benefit of a rate based upon the actual value where the Official Express Classification conditions precedent to the application of that latter rate have not been complied with?

2. Where the Railway Express Agency, Inc. has filed with the Interstate Commerce Commission its Official Express Classification offering shippers different services dependent upon rate and charges should not a shipper be bound by the service chosen for the charges paid?

3. Where the Railway Express Agency, Inc. as a common carrier has complied with the provisions of the Interstate Commerce Act and the requirements of the Interstate Commerce Commission and has issued its Uniform Express Receipt, said receipt contains the entire contract upon which the responsibilities of the parties rested and therefore should not the value declared therein be binding on the shipper as well as the carrier regardless of the actual value of the shipment?

4. Does a change in the customary handling of a shipment by an employe of a common carrier either by ignorance, mistake or otherwise compel the common carrier to assume greater liability than that declared in the receipt?

The Statutes Which the Case Involves.

Title 49 U. S. C. Section 1(3)(a); Section 6(1), (7); Section 10(1), (2), (3) and Section 20(11). The relevant provisions of these statutes appear in Appendix B of this petition.

Statement of Case.

On December 20, 1955, a representative of respondent telephoned the office of petitioner, Railway Express Agency, Inc. and requested that a shipment be picked up, but, did not state the contents of the shipment or its actual value. At about 5:00 P. M. that day a driver of petitioner called at the safe deposit vault of the Chase Manhattan Bank at No. 535 Fifth Avenue, New York City, and there received a box weighing 50 pounds consigned to Malvern, Pennsylvania.

The box was accepted and the driver of petitioner issued a Uniform Express Receipt therefor. The driver examined the box and found the only markings thereon were the consignor's and consignee's names and addresses. The receipt was written out by the driver of petitioner, the information thereon having been taken from the markings on the box. The driver of petitioner asked the representatives of the plaintiff whether they wished to declare a value, and they replied "$50", whereupon the driver collected $2.90, the charge applicable on all 50 pound shipments subject to first-class rates in the Official Express Classification when such shipments are forwarded under a released value not exceeding $50 or 50¢ per pound between New York City, N. Y. and Malvern, Pennsylvania.

At the time the driver asked for the declared value he was told that the box contained platinum. He was also told that said value was declared pursuant to instructions and because they had outside insurance. The driver of petitioner wrote the word "platinum" on the receipt.

The receipt was accepted by the representative of respondent and the driver pasted the "King Label", part of the receipt on the box which showed the sum of $50. Therefore, the only markings on the box as to the value

was $50 as shown on the "King Label". The box was not sealed with wax or approved lead seal, did not have written thereon the actual contents nor did it have written thereon the actual or market value of the contents.

The driver of petitioner took the box to his truck and there of his own accord without the knowledge of petitioner and without knowledge of the actual value or nature of the contents of the box entered the shipment in his value book. This is a book in which there is entered shipments with declared values of $50 or more per pound. The box together with other shipments was transported to the express depot at Long Island City and was transferred from the truck to the value room.

In the value room not all shipments are handled as "values". The shipments are assorted and only those that meet the Classification requirements continue as "values". This shipment left the value room unclassified because it had nothing on it to make it a "value". The shipment was not delivered and has never been located.

The Uniform Express Receipt was submitted in evidence as defendant's Exhibit A. This receipt states as follows:

> "Value herein declared by shipper to be $50.00 which the company agrees to carry upon the terms and conditions printed on the back hereof, to which the shipper agrees, and as evidence thereof accepts this receipt."

Further, this receipt states:

> "Subject to the Classification and Tariffs in effect on Date of Issue."

The Official Express Classification in force and effect on date of issue of the Uniform Express Receipt and on file with the Interstate Commerce Commission was submitted in evidence as plaintiff's Exhibit 4. Its supplements thereto

were also submitted in evidence as plaintiff's Exhibit 4-A and Exhibit 4-B. The tariffs applicable to this shipment from New York City to Malvern, Pa. were submitted in evidence as defendant's Exhibits B, C, D and E. The Released Rates Order No. 848 issued by the Interstate Commerce Commission authorizing the released rate of $50 or 50¢ per pound was submitted in evidence as defendant's Exhibit F. The terms and conditions of the Uniform Express Receipt are incorporated in and made a part of defendant's Official Express Classification and Tariffs as filed with the Interstate Commerce Commission. Clause 2 of the terms and conditions of said receipt provides:

> "2. In consideration of the rate charged for carrying said property, which is dependent upon the value thereof and is based upon an agreed valuation of not exceeding fifty dollars for any shipment of 100 pounds or less, and not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared at the time of shipment, the shipper agrees that the company shall not be liable in any event for more than fifty dollars for any shipment of 100 pounds or less, or for more than fifty cents per pound, actual weight, for any shipment weighing more than 100 pounds, unless a greater value is stated herein. Unless a greater value is declared and stated herein the shipper agrees that the value of the shipment is as last above set out and that the liability of the company shall in no event exceed such value."

Defendant's Official Express Classification (Plaintiff's Exhibit 4) Rule 13, entitled "Valuation Charges" at Page 24, provides:

> "(a) Rates named in tariffs governed by this Classification, except as to ordinary live stock, are dependent upon and vary with the declared or

released value of the *property*, and, except as to articles provided for in Rule 13(b) and except as to live animals, live stock and other live creatures provided for in Rule 13(c), are based upon *property* declared to be of, or released to, a value not exceeding $50 for any shipment of 100 pounds or less, or not exceeding 50 cents per pound actual weight for any shipment in excess of 100 pounds. When the declared or released value exceeds the above stated, the charges are 15 cents greater for each $100 or fraction thereof in excess of the value stated above." (Italics ours.)

The Released Rates Order No. 848 (the defendant's Exhibit F) authorizes the acceptance and transportation in interstate commerce of "property" under released rates. It states:

"• • •

The Railway Express Agency, Incorporated, having petitioned the Commission under Twentieth Section Application No. 1087 dated February 21, 1929, for authority on behalf of itself and all other carriers by express parties to Official Express Classification No. 30, I. C. C. No. 3280, for authority to establish and maintain released rates for the transportation by express of furniture not boxed, wrapped, or crated, and of other property as specified in Rule 13, paragraphs (a), (b) and (c) of said Official Express Classification, and the Commission having considered said application and there appearing no cause for refusing to permit the establishment and maintenance of such rates:

IT IS ORDERED, that the petitioners herein be, and they are hereby, authorized to establish and maintain in the manner prescribed in Section 6 of the Interstate Commerce Act, released rates for the transportation in interstate commerce of *property* as indicated in the next preceding paragraph hereof and in the said application." (Italics ours.)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The writ should be allowed because the Official Express Classification and Tariffs permit the petitioner to transport and deliver property including platinum or precious metals on a value declared by the shipper. If the contrary is to be countenanced, it should not be without the approval of this court.

It is evident that the decisions of the Court of Appeals of the State of New York and of the Appellate Division of the Supreme Court, First Department indicate that the Official Express Classification has been misinterpreted, misconstrued and misapplied.

The Official Express Classification and Tariffs duly filed by petitioner with the Interstate Commerce Commission pursuant to and in accordance with the requirements of the Interstate Commerce Act have the force and effect of statutes.

> *Pennsylvania R. R. Co.* vs. *International Coal Mining Co.*, 230 U. S. 184;
> *Atchison, Topeka & Santa Fe Railway Company* vs. *Robinson*, 233 U. S. 173;
> *Great Northern Ry.* vs. *O'Connor*, 232 U. S. 508.

The decisions of the Appellate Courts in this case appear to be based upon the erroneous assumption that the Official Express Classification is divided and completely separated into two Classifications, i.e., the Merchandise Classification and the Money Classification. The Appellate Courts have erred in arriving at this assumption to the prejudice of your petitioner and to all other common carriers.

As a result of this error the Appellate Courts arrived at the erroneous conclusion that petitioner's tariffs quite clearly say and mean that platinum is to be shipped only under the "Money Classification" and at the rate charged for shipments of gold. The Appellate Courts further arrived at the erroneous conclusion that respondent as the shipper had no choice between the lower rate or lower declared value.

Respondent had and has a choice of services and rates under the Official Express Classification and a lower rate for lower declared value as well as higher rates for higher declared value up to the actual and full value of the property.

At the trial the testimony presented by petitioner which was not contradicted was to the effect that petitioner has only one Official Express Classification with provisions to indicate the services shippers may choose dependent upon the choice of rates. Although the said Classification is divided for convenience into two sections covering respectively "Merchandise Classification Articles" and "Money Classification Rules and Articles" the former covers all property. This is set forth in Rule 1(a) of the Official Express Classification in that part entitled "Merchandise Classification Rules" which reads as follows:

> "Application of Rates and Charges:
>
> (a) First-class rates are applicable to all property received for transportation by the Express Companies, parties to the Classification, unless otherwise hereinafter provided."

It is important to note that the Official Express Classification differs from classifications of railroad and truck companies and that the first-class express rates are applicable to all property received for transportation except where exceptions are specifically enumerated.

Under that part of the classification which is entitled "Merchandise Classification Rules, a shipper is afforded the opportunity to ship at a declared or released valuation of not exceeding $50 for any shipment of 100 pounds and to declare a higher valuation up to the actual value of the property by paying 15¢ for each $100 declared value. This provision is found in said Classification under Rule 13 which provides as follows:

> "(a) Rates named in tariffs governed by this Classification, except as to ordinary live stock, are dependent upon and vary with the declared or released value of the *property*, and, except as to articles provided for in Rule 13(b) and except as to live animals, live stock and other live creatures provided for in Rule 13(c), are based upon *property* declared to be of, or released to, a value not exceeding $50 for any shipment of 100 pounds or less, or not for any shipment in excess of 100 pounds. When the declared or released value exceeds that above stated, the charges are 15 cents greater for each $100 or fraction thereof in excess of the value stated above." (Italics ours)

Thus, there was provided in the Classification the provision for shipping platinum at the released valuation although the Court of Appeals has interpreted the Classification as not affording that opportunity. After interpreting the Classification that it did not afford the shipper the opportunity to ship at a released valuation of $50, the Court of Appeals has ruled the rates and charges set forth in that part of the Express Classification entitled "Money Classification" are applicable. These last mentioned rules provide certain conditions precedent which must be complied with before they become applicable and are specified in Rule 40-A, Supplement 23 of said Official Express Classification and provide as follows:

"(c) Except as otherwise provided herein, shipments must not be received for transportation at the rates named in the Money Classification unless the actual market value is declared by the shipper and marked by him upon the package.

"(d) Packages must be sealed as provided in the following paragraphs:

"(1) * * *; must be sealed with wax or approved lead seal each seal showing a distinct and perfect impression of the sealing instrument."

Although these rules were not followed, the Court of Appeals nevertheless has ruled that the Money Classification rules, rates and charges are applicable to this shipment. This, in effect, is a waiving of the tariff requirements and is contrary to the ruling laid down by this Court in the case of *Davis* vs. *Henderson*, 266 U. S. 92. In that case the Writ of Certiorari was granted by this Court and this Court said at page 93:

"There is no claim that the rule requiring written notice was void. The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariffs. The rule was a part of the tariff."

This Rule places the burden on the shipper to properly prepare the shipment for such service at a higher charge. Had the shipment been properly prepared by compliance with the aforesaid Rule 40-A (c), (d) and (1), it would have been notice to petitioner to charge the Money Classification rates and to transport it pursuant thereto. But respondent having failed to comply with said Rule and having chosen to forward the shipment under the released value of $50 for which he paid the first-class rate as an item under that part of the Classification designated as "Merchandise Classification" petitioner had no choice but to accept it at its face

value and also accept it in compliance with the published tariff rate.

The mere reference to the word "platinum" written on the receipt by the employe of petitioner did not convey to the employe nor to petitioner the actual value of the shipment nor did it indicate the type or kind of property contained in the box. It could have been worth $50 or less or more.

The respondent, having chosen one of the services described in the Official Express Classification, should not be permitted to circumvent the clear requirement of the Interstate Commerce Commission.

There can be no question of petitioner's obvious good faith in receiving the package and in charging a rate and in rendering a service as requested by respondent. If the decision of the Court of Appeals of the State of New York is permitted to stand, the respondent will be permitted to profit by deviation and concealment. It would be in effect a fraudulent act and would be contrary to the intent and purpose of the Interstate Commerce Act, the rules and regulations promulgated by the Interstate Commerce Commission and the law as established by this Court. It would defeat the intent and purpose of the Official Express Classification as filed by petitioner and would result in violation of Section 10(3) of the Interstate Commerce Act.

II.

The respondent is bound by the terms and conditions of the Uniform Express Receipt.

Petitioner seeks to challenge, by this writ, the final judgment of the Court of Appeals of the State of New York, and the reasons therefor given in the written opinion filed and entered by said Court in support of said judgment,

whereby the said Court construes the Act of Congress approved August 9, 1916, 39 Stat. 441 (Titled 49 U. S. C. Sec. 20(11), and known as the "Second Cummins Amendment" to the Interstate Commerce Act, to require any common carrier, railroad, or transportation company, to which property may be delivered for transportation, to be liable to the lawful holder of receipt or bill of lading for such property, for the actual loss, damage or injury to such property, notwithstanding any limitation of liability or limitations of the amount of recovery, or representation or agreement as to the value in any such receipt or bill of lading.

The limitation of liability in the Uniform Express Receipt, as set forth in the tariff authorized by the Interstate Commerce Commission, and duly filed and published, in effect between the City of New York, New York, and Malvern, Pennsylvania, on December 20, 1955, is binding upon the respondent and petitioner.

Adams Express Co. vs. *Croninger*, 226 U. S. 491;
Kansas City Southern Railway Co. vs. *Carl*, 227 U. S. 639;
Southern Ry. Co. vs. *Prescott*, 240 U. S. 632;
New York Central etc. vs. *Beaham*, 242 U. S. 148;
American Railway Express Co. vs. *Daniel*, 269 U. S. 40;
American Railway Express Co. vs. *Lindenberg*, 260 U. S. 584;
St. Louis I. Mt. & So. Ry. Co. vs. *Starbird*, 243 U. S. 592;
Southeastern Express Co. vs. *Pastime, Amusement Co.*, 299 U. S. 28;
Peyton vs. *Railway Express Agency*, 316 U. S. 350;
Feinberg vs. *Railway Express Agency*, 163 F. 2nd 998, certiorari denied 332 N. Y. 847.

The value declared is binding regardless of the actual value of the shipment.

George N. Pierce Co. vs. *Wells Fargo Express Co.*, 236 U. S. 278.

To allow the respondent to recover the full value of his shipment, where he paid only the normal first-class rate, which is based upon the value of $50.00, would result in discrimination, which is forbidden by Acts of Congress.

Union Pacific Railroad Company vs. *Burke*, 226 N. Y. 534 Affirmed 255 U. S. 317;
Kansas City Southern Railway Co. vs. *Carl*, 227 U. S. 639, 652, 653;
American Express Co. vs. *U. S. Horse Shoe Co.*, 244 U. S. 58, 65;
Chicago & Alton Railroad Co. vs. *Kirby*, 225 U. S. 155, 165;
Pennsylvania R. R. Co. vs. *International Coal Co.*, 230 U. S. 184;
Great Northern Ry. vs. *O'Connor*, 232 U. S. 508.

III.

No act of an employe of the carrier can change the terms and conditions of the Uniform Express Receipt.

The driver of petitioner wrote the word platinum on the Uniform Express Receipt, thereafter made an entry in the "value book" and eventually the shipment was placed in the "value room" until it was assorted and determined that it was not a "value shipment".

Such handling did not alter or change the terms and conditions of the Uniform Express Receipt nor the Classification and Tariffs.

The express contract is the only contract which can be made which is evidenced by the Uniform Express Receipt, its terms and conditions, and the Classification and Tariffs on file and in effect at the time the shipment was receipted for.

American Trust Co. vs. *American Railway Express*, 47 Fed. 2nd 16;
New York Central, etc. vs. *Beaham*, 242 U. S. 148, 151.

This could be the only effective contract as otherwise the purpose of the Interstate Commerce Act to close the door to all forms of unjust discrimination would be nullified.

Kansas City Southern Ry. vs. *Carl*, 227 U. S. 639, 652, 653.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari to the Court of Appeals of the State of New York be issued herein.

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APPENDIX A

Opinion of the Court of Appeals State of New York.

IN THE

STATE OF NEW YORK COURT OF APPEALS

No 86.

W. R. Grace & Co.,

Respondent,

vs.

Railway Express Agency, Inc.,

Appellant.

June 9, 1960.

Chief Judge Desmond. The suit is against Railway Express Agency, Inc., for the value of a quantity of platinum which disappeared after being entrusted to the Express Agency for interstate transportation. Plaintiff's recovery was limited by the trial court to $50 because plaintiff's agent had declared a $50 value to defendant at the time of shipment and had not paid the much higher express rate that would have been due pursuant to defendant's tariffs had the value of the platinum (about $56,000) been correctly declared to defendant. The Appellate Division modified and ordered judgment for plaintiff for the full value less the balance of transportation charges due at the higher rate for higher value. We affirm that judgment. Although the shipper had declared a $50 value only, the carrier's agent was at the time of acceptance of the shipment told that the package contained platinum and

wrote "platinum" on the receipt. Defendant's tariffs required that precious metals such as platinum be received and carried under what is called the "money classification" and not under the "merchandise classification". All shipments of merchandise subject to the "money classification" were, according to the tariff, required to be charged for at the so-called "gold coin rates" without any choice of rates dependent on value. The Appellate Division opinion cited the settled rules that unless a shipper be given a choice of rates an interstate carrier cannot limit its liability to less than the true value, that a carrier cannot charge or receive a rate different from that specified in its currently effective tariff, and that it is the regulatory scheme of the Interstate Commerce Act (U. S. Code, tit. 49, §1 et seq.) which governs, not the common law. It is undisputed that the carrier here knew that it was accepting a shipment of platinum. From that fact it followed that defendant was bound to charge the shipper the full tariff rate for a precious metal and that the statement of a lower value was ineffective for limiting liability (*New York & Honduras Rosario Min. Co.* v. *Riddle Airlines*, 3 A. D. 2d 457, affd. 4 N. Y. 2nd 755).

Defendant's tariff quite clearly says and means that platinum is to be shipped only under the "money classification" and at the rate charged for shipments of gold coin. Thus, this shipper had no choice between a lower rate for lower declared value, and a high rate for full value. Two years ago we passed on these identical questions in *New York & Honduras Rosario Min. Co.* v. *Riddle Airlines* (4 N Y 2d 755, *supra*). In *Rosario*, plaintiff mining company had shipped gold and silver bullion on two airlines called TAN and Riddle Airlines, from Honduras to the United States. TAN carried the package to Miami, then Riddle picked it up and took it to New Jersey. The original airway bill of lading issued by TAN provided that the shipper was required to accept the tariffs, classifications and rates of both carriers. TAN's tariffs permitted the carriage of bullion at reduced rates at a nominal declared valuation of $100 but there was no such reduced rate or limitation of

liability available in Riddle's tariffs. Some of the bullion was lost while in the custody of Riddle. The courts held Riddle liable on the ground that while Riddle's tariffs allowed it to limit liability with respect to cargo generally, there was an entirely different provision as to this bullion as to which actual value was required to be declared and as to which freight charges had to be paid on weight and actual value. In *Rosario*, as here, the shipper declared a nominal value and paid freight thereon instead of declaring actual value and paying rates based thereon. There was no enforcible limitation of liability and the carriage agreement was treated as if the bullion had been declared at actual value. The facts of the present case bring it directly within the *Rosario* decision and of many older State and Federal holdings (see, for instance, *Burke* v. *Union Pacific R. R. Co.*, 226 N. Y. 534, 543, affd. 225 U. S. 317; *Emily Shops* v. *Inter-State Truck Line*, 2 N Y 2d 405).

The facts here are undisputed and nothing in them absolves defendant from full liability. This platinum weighing about 50 pounds and belonging to plaintiff was received by defendant's driver at a safe deposit vault of a New York City bank from two men representing a company known as Colamer, acting for plaintiff in the transaction. When defendant's driver received it, the platinum was in a box completely wrapped, covered with sealing tape, bound with wire strappings all sealed up. On the package there were shipping tags showing that it was destined for a consignee in Pennsylvania. There was nothing on the package to show the nature of the contents or their value and the driver was not at any time told the actual value. However, he was told on receipt of the package that it contained platinum and he wrote "platinum" on the receipt which he gave to the Colamer representatives. This receipt was in the ordinary merchandise form and was not the form of receipt which defendant used on acceptance of gold coin and precious metals. The driver did not have in his possession any of the latter type of receipt. He asked the

Colamer representatives whether they wished to declare a value and they replied "$50", whereupon the driver collected $2.90, the ordinary freight rate for ordinary merchandise of a declared value of $50. The Colamer representatives knew that the actual value was some $56,000.

The rate for precious metals for the distance here travelled was $130.93 instead of the $2.90 actually charged. Although the only value declared to the driver was $50, he entered the shipment in a so-called "value book" carried by him in which there are entered records of shipments with declared value of $50 or more per pound. When he arrived at defendant's freight depot in Long Island City he turned the package over to another representative of defendant who told the driver that this was not a "value shipment" because only $50 was declared. But the other man was then told by the driver that the box contained platinum and the package was put into the so-called "value room" where precious metals, etc., are kept. The express company's rules required that a shipment of precious metals not only be put into the "value room" but that it be handled under armed guard. The latter precaution was not carried out as to this shipment. However, as it seems to us, the question is not whether the express company treated this as a valued shipment of precious metals. The applicable law plainly states that neither the character of service nor the rates could validly be changed from those expressed in the tariffs.

The arguments of defendants are based on the express receipt's stated limitation of $50, on defendant's lack of knowledge of the actual value and on the statement of plaintiff's agent at the time of shipment that plaintiff had its own "outside insurance". All these arguments are answered by the *Rosario* decision (*supra*).

The judgment appealed from should be affirmed, with costs.

Dye, J. (dissenting). I dissent and vote to reverse and to grant a new trial upon the ground that the shipper was

bound by the terms and conditions of the uniform express receipt which it had accepted. The shipper "because it had its own insurance", had declared the shipment was valued at $50.

The Interstate Commerce Act condemns discrimination in rates and the giving of preferences to any shipper (U. S. Code, tit. 49, §§2, 3, subd. (1)). Subdivision (11) of section 20, enacted as a part of the statutory scheme to curb such sharp practices, makes carriers liable for actual losses sustained, subject to exceptions authorized in writing by the Interstate Commerce Commission. Because the currently effective tariff schedules did not allow a choice of rates to be given with respect to shipments of crude platinum, the majority are now holding that the carrier must bear liability for the full value of the shipment.

Railway Express Agency, Inc., had no knowledge of the actual value of this shipment; it had knowledge only of the value stated by the shipper's agent. Mistakenly, it relied upon the value declared. Indeed, for all it knew, the value did not exceed $50. For the delivery of crude platinum, the shipper was thus able to obtain a rate based on a merchandise classification, thereby realizing a saving of $128.03.

No one would contend that the statute creates responsibility for the actual value of loss where the carrier has been deceived as to the contents of a shipment. The entire act opposes any such concept of liability. In the present case, which essentially is not very different, there is no doubt of the carrier's obvious good faith in receiving the package and in charging a rate commensurate with the value as represented. There was no intent to circumvent the clear requirements of the Interstate Commerce Act. The case of *New York & Honduras Rosario Min. Co.* v. *Riddle Airlines* (3 A. D. 2d 457, affd. 4 N. Y. 2nd 755) is, therefore, not persuasive, for there the shipment was knowingly and willfully made in violation of the published tariff rate; the carrier knew the actual value of the shipment, yet deliberately undertook to carry it for less than the applicable rate.

Holding a carrier strictly accountable for the actual loss, on such a showing as this, opens wide the door to unconscionable practices, and does nothing to serve the useful and sound public policy expressed by the Interstate Commerce Act.

Van Voorhis, J. (dissenting). I concur in the dissent of Judge Dye. This shipment was required to be rejected under the filed tariffs "unless the actual or market value is declared by shipper and marked by him upon the package." Fifty dollars was marked on the package. Oral notice to the truckman that it might be worth more than this was not effective notice to the carrier, the truckman was not charged with that amount of responsibility, he would not normally have been expected to report such knowledge to the general officers or agents of the company before receiving the package nor is defendant chargeable with knowing what he knew when he received the parcel (*Corrigan* v. *Bobbs-Merrill Co.*, 228 N. Y. 58). Once this shipment had been delivered to defendant and accepted by it under the false statement of value made by plaintiff, what was defendant to do? Plaintiff cannot take advantage of its own wrong.

Judges Fuld, Froessel, Burke and Foster concur with Chief Judge Desmond; Judge Dye dissents in an opinion in which Judge Van Voorhis concurs in a separate memorandum.

Judgment affirmed.

Judgment by Qrder of the Court of Appeals, State of New York.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK.

W. R. GRACE & Co.,

Plaintiff,

against

RAILWAY EXPRESS AGENCY, INC.,

Defendant.

The defendant having appealed to the Court of Appeals of the State of New York from the judgment of this Court, entered, January 20, 1960, in favor of the plaintiff and against the defendant, and said Court of Appeals having duly heard the said appeal and ordered and adjudged that the judgment be affirmed with costs and disbursements;

Now, on motion of Joseph Haskell, attorney for the plaintiff; it is

ADJUDGED that the judgment of this Court, entered in the office of the Clerk of this Court on January 20, 1960, be, and the same is, affirmed and that W. R. Grace & Co., having its place of business at 7 Hanover Square, in the Borough of Manhattan, City of New York, have judgment against Railway Express Agency, Inc., with offices at 219 East 42nd Street, New York, N. Y., in the sum of $298.93 costs and disbursements, and that the plaintiff have execution therefor.

Dated, New York, June 17, 1960.

/s/ JAMES McGUIRRIN,
Clerk.

APPENDIX B

Statutes.

§1, par. (3). *Definitions.* (a) The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this chapter includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

§6, par. (1). *Schedule of rates, fares, and charges; filing and posting.* Every common carrier subject to the provisions of this chapter shall file with the Commission created by this chapter and print and keep open to public

inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter.

§6, par. (7). *Transportation without filing and publishing rates forbidden; rebates; privileges.* No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or

collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

§10. *Violation of regulations by carriers; discrimination; penalties*
Violation by carrier or officer; penalty

(1) Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this chapter required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this chapter to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this chapter for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed $5,000 for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such

person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

False billing or classification by carrier; penalty

(2) Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

Obtaining lower rates by false billing, etc., or by false claim; penalty.

(3) Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this chapter, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, directly, or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, fals representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent, or officer, obtain or attempt to obtain

transportation for such property at less than the regular rates then established and in force on the line of transportation; or who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false statement or representation as to cost, value, nature or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious or fraudulent or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with or growing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding $5,000 or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court: *Provided*, That the penalty of imprisonment shall not apply to artificial persons.

§20, par. (11). *Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim.* Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transporta-

tion company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the

same as that of such carrier by water; *Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad:

Provided further, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided further*, That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further*, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided.

IN THE

Supreme Court of the United States

October Term, 1960

No. 289

RAILWAY EXPRESS AGENCY, INC.,

Petitioner,

AGAINST

W. R. GRACE & CO.,

Respondent.

RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 289

RAILWAY EXPRESS AGENCY, INC.,

Petitioner,

AGAINST

W. R. GRACE & CO.,

Respondent.

RESPONDENT'S BRIEF

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States.

Respondent, the plaintiff below, resists review of the judgment of the Court of Appeals of the State of New York, dated and entered June 9, 1960, which is not appended to the petition. The judgment appended to the petition is merely a ministerial judgment of the New York Supreme Court, the court of original jurisdiction, to enable the enforcement of the judgment of the Court of Appeals and is not reviewable by this court. *Department of Banking of Nebraska, Receiver,* v. *Pink, etc.*, 317 U. S. 264; *Cole* v. *Violette, et al.*, 319 U. S. 581. The Court of Appeals, opinion by Desmond, Ch. J. (8 N. Y. 2d 103), affirmed a judgment of the New York Supreme Court, Appellate Division (R. 205-208; App. A, pp. 17-18), which

reversed the findings of fact of the trial court inconsistent with the findings of fact made by the Appellate Division in its opinion and, in lieu thereof, made new findings of fact contained in its opinion, and modified a judgment of the Supreme Court, New York County, entered after trial to the court without a jury, by increasing respondent's recovery to $56,245.75, the actual value of the platinum lost in interstate transportation by the petitioner—common carrier by rail, less the unpaid transportation charges of $128.03, for a net recovery of $56,117.72, with interest and costs (R. 208, 211, 219; App. A, p. 18; App. B, p. 29). It is elementary now that the facts found by the Appellate Division are conclusive on this Court. *King* v. *West Virginia*, 216 U. S. 100; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 97; *Chrisman* v. *Miller*, 197 U. S. 319.

Petitioner's position is placed, at least in great part, upon facts reversed and found to the contrary by the Appellate Division.

Jurisdiction

The grounds, upon which petitioner invokes the jurisdiction of this Court, are entirely without substance or support.

(1) This Court has long since settled the questions of law involved and the decisions of the Court of Appeals and Appellate Division of New York completely conform thereto.

(2) (a) The New York Court of Appeals and Appellate Division have decided the federal questions of law strictly in accordance, and not in conflict, with the applicable decisions of this Court.

(b) The Court of Appeals of New York has *not* departed from the accepted and usual course of judicial review. Such a statement by petitioner to the contrary is incomprehensible. Petitioner appealed of right to the Court of Appeals, filed the proper record on appeal with several separate exhibits and a 42 page printed brief, and was accorded the greater part of an hour's full oral argument before the Chief Judge and the six Associate Judges, *en banc*. Every member of the Court passed on petitioner's points, and the result is in absolute accord with the decisions of this Court.

(c) The decision in this case affects *only* the petitioner and only in this case. Only the petitioner express company and possibly some air express or freight carriers have a "Money Classification and Tariff" or Special tariff provisions under which they may transport precious metals only at actual value and with *no* order by the Interstate Commerce Commission or the Civil Aeronautics Board authorizing a "declared value" or limitation of liability. The railroads and motor carriers are not in the least affected—they are not authorized to transport precious metals or other articles of extraordinary value.

(3) The decision and judgment of the Court of Appeals is *not* against any title, right, privilege or immunity, and the authority exercised under the United States, to which petitioner has any valid claim.

Questions Presented by the Case

The questions of law presented by the case and decided by the New York Court of Appeals and the Appellate Division, were not as stated by petitioner. We, therefore, state them here.

1. May the petitioner express company, a common carrier by rail, subject to the Interstate Commerce Act, apply the First Class pound rates established by its Merchandise Classification and Tariffs and an authorizing order of the I. C. C. for the transportation of ordinary merchandise based upon weight and a released or declared valuation, to a shipment of crude platinum (a precious metal) lost by it in transit and escape liability for the full actual value thereof, where it was not authorized by the Commission to transport the same under the said Merchandise Classification or under a released or declared valuation or limitation of liability but was authorized to transport the same *only* under petitioner's Money Classification at actual value at "Gold-Coin Rates" applicable to the actual value of the property shipped, and no order had been issued by the Commission authorizing petitioner to establish rates for such transportation based upon a released or declared valuation or to limit the amount of its liability?

2. Was petitioner bound by its Money Classification and Tariffs filed with and approved by the Commission and applicable to the shipment involved?

3. Did the applicable Classification and Tariffs filed with and approved by the Commission constitute the contract of carriage and control the rights and responsibilities of the parties where the form of Receipt issued by petitioner's agent was not the proper form of Receipt required to be issued for the known specific class of property shipped and its provisions were contrary to and in violation of the said Classification and Tariff?

4. Could the acts of petitioner's receiving agent, intentional or unintentional, create rights and responsibilities of the parties other than and different from those

established by the applicable filed Classification and Tariff?

Questions 1 and 4 above were answered in the negative and questions 2 and 3 above were answered in the affirmative, which strictly adhered to the determinations of this Court in construing and applying the Interstate Commerce Act (49 U. S. C. A., Sec. 20 (11)).

Statement of Case

We state the case here because the petitioner's statement is incomplete and contains inaccuracies and facts which were reversed by the New York Appellate Division and are contrary to the facts found by that Court.

We note at the outset that there was no fraud or deceit practiced by the shipper upon petitioner (R. 219; Pet. A-1, A-3, A-4).

At the times material hereto, petitioner's Classification and Tariffs, filed and approved by the Interstate Commerce Commission and lawfully in effect, was divided into two separate major parts, to wit: "Merchandise Classification" (Plf's Ex. 4, pp. 3-17, 20-73; R. 243) and "Money Classification" (Plf's Ex. 4, pp. 74-79; R. 213; Ex. 4-A, pp. 6-11).

The "Merchandise Classification" specified the "Class Rates" (First Class, Second Class), "Commodity Rates" and "Live-Stock Rates" applicable to ordinary merchandise and live-stock and contained *no* provisions with respect to "platinum" (precious metals), the property here involved, other than "articles manufactured thereof" (Plf's Ex. 4, pp. 14, 68, Item 2420). The Merchandise Classification" also contained the "Uniform Receipt" form (which was improperly issued by petitioner

in this case) and the "Live-Stock" forms (Plf's Ex. 4, pp. 39, 40-44) and the "Carvings, Ceramics, etc." form (Plf's Ex. 4, p. 45). The "Class Rates", which were applicable to ordinary merchandise shipments, were "base rates" per pound of weight where the shipment was released to a value of $50 or .50¢ per pound actual weight if the weight was over 100 pounds. The "Merchandise Classification" contained "Rule 13. Valuation Charges" which provided for "valuation charges" on ordinary merchandise shipments, in addition to the "Class" or "Base" pound rates, of .19¢ per $100, or fraction thereof, of values in excess of the $50 or .50¢ per pound declared in writing by the shipper. The "base rates", valuations, valuation charges and limitations of liability applied to and were effective only on shipments of property specified in the Rule and in orders of the Commission authorizing the same. Neither the "base rates", valuations, valuation charges, limitations of liability nor any authorizing order of the Commission applied to "platinum", the property involved herein. For ordinary merchandise shipments, the "Uniform Express Receipt" was used (R. 75), the original issued to the shipper and the duplicate original retained by petitioner as its only record of the shipment until when and if it reached its destination a delivery receipt was obtained from the consignee, petitioner's "pick-up" agent merely tossing it from his truck on to the terminal platform for forwarding without obtaining any receipt or record whatsoever (R. 132-133). "Ordinary merchandise is something very distinct in the classification of the company from jewels and precious metals" (R. 169).

The "Money Classification" provided the only authority, conditions and rates under which petitioner was permitted to transport "platinum" (Plf's Ex. 4, pp. 74-76, as Am'd by Plf's Ex. 4A, Supp. 23, pp. 7, 9, Rules 41 B(b)

and 43-B(h) Pet. A-2) and required petitioner to issue a "Money receipt" for all matter received (Plf's Ex. 4-A, Supp. 23, p. 6, Rule 40-A(a)), which was not done in this case (Pet. A-3). The provisions governing are as follows:

> "(h) PRECIOUS METALS, N. O. S. (not otherwise specified):
>
> Precious Metals * * * (Platinum *) not including articles manufactured thereof will be charged for at Gold Coin Rates named in Rule 41-B(b), page 7 of this supplement on actual value and First Class Package rates on weight in excess of 2 pounds to the $1,000 actual value. * * * " (Plf's Ex. 4-A. Suppl. #23, p. 9. Rule 43-B(h)).

Rule 40-A(e) of the "Money Classification" (Plf's Ex. 4-A, Supp. #23, p. 6) expressly excludes the application of Rule 13 (Valuation Charges) of the "Merchandise Classification" from any application to precious metals (Platinum) where a "mixed shipment" is made containing both precious metals and ordinary merchandise.

"Money Classification" shipments were handled by the petitioner under person-to-person signature from the petitioner's receiving agent through its "Money or Value Department" into the hands of the consignee at destination. No shipment was permitted to leave the "Value Room" without obtaining a signature from the person taking it therefrom. The "Value Room" was manned by special armed clerks (R. 91-93; 211; Pet. A-4).

On December 20, 1955, Messrs. McDonald and O'Neill of Colamer Company of 535 Fifth Avenue, New York

City, who were, in fact, unfamiliar with the petitioner's Classifications and Tariff (R. 33), in the basement vault of the Chase Manhattan Bank at that address, delivered to a Mr. Mullaney, petitioner's receiving agent of some 22 years service and experience, a box containing some 600 troy ounces of Crude Platinum for transportation to Malvern, Pa., and delivery there to J. Bishop & Co. to refine for the account of W. R. Grace & Co. (R. 26-28, 38). The platinum was contained in two metal containers with screw-tops securely wax-sealed, nested in a wooden box, built for the purpose of shipment, with the lid firmly nailed in place, the box completely wound and covered with 2½" gummed tape and then wired strapped with the wire mechanically sealed. The names and addresses of the shipper and consignee were placed upon the package as well as upon several shipping tags supplied by petitioner and affixed by means of accompanying wires (R. 26-28, 38; Pet. A-3). Mullaney inquired as to contents and weight and was told it was about 50 pounds of platinum (R. 31, 35, 48). Mullaney then asked if "they" wanted to declare a value and they replied $50. Mullaney did not ask for the actual value although he knew that platinum "was a precious metal equivalent to a greater-than-gold value" (R. 53, 58, 154). Mullaney did not consult his copy of the Express Classification to ascertain the proper classification of the property and the appropriate rate. Nor did he refuse to accept the shipment in its condition as tendered to him and in the absence of a statement of the actual value. Neither did he use the "Money Receipt" required by the "Money Classification". Instead, he produced a book of "Prepaid Uniform Express Receipts," which were used only for shipments of ordinary merchandise, wrote in the blank spaces provided therefore, on the original and duplicate, the names and addresses of the shipper and consignee, the description of the property shipped as

"Platinum" and the weight 50 pounds. Then he consulted and applied the First Class Package Rates (Def't's Ex. B) to the weight of 50 pounds and, incorrectly arrived at charges of $2.90, which he entered in the Value Book and collected from the shipper. The original Receipt he signed and delivered to the shipper, put the package on his shoulder and departed (R. 72-76).

Note here that the Receipt (Def't's Ex. A), on which petitioner relies, was admitted in evidence solely as a receipt and *not* as a valid contract of carriage between the parties (R. 38-39).

Mullaney entered the shipment in his "Value Book" as containing "Platinum" (R. 76-77), delivered it as a "Value" shipment personally to O'Connor, the "Value Room" clerk on the Terminal platform, who signed a receipt to Mullaney for the shipment as a "Value" shipment containing "Platinum" (R. 77-78, 89) and, in turn, personally delivered it to the clerk in charge of the "Value Room" and secured his signature therefor as a "Value" shipment containing "Platinum" and the latter placed and kept the shipment in the "Value Room" (R. 89-91). This was the handling required by the petitioner's Classification, Tariff and Rules and was exactly the handling it also would have received if the package contained external wax or lead seals, and if the words "Platinum—actual value $56,245.75" had been endorsed thereon externally (R. 249). The shipment was never delivered to the consignee or returned to the shipper. The petitioner has absolutely no record of the shipment beyond its receipt into the "Value Room" at its Terminal in Sunnyside, L. I., N. Y. Its rules required a signature for every shipment leaving the "Value Room".

The proper charge at Gold Coin Rates on actual value amounted to $130.93. Mullaney collected $2.90, leaving

$128.03 charges due petitioner (R. 211-212). The New York Appellate Division allowed recovery "of $56,117.72 (value $56,245.75, less unpaid transportation charges of $128.03)" (R. 211; App. B, pp. 21, 29).

REASONS FOR THE DISALLOWANCE OF A WRIT

I

Petitioner's Official Express Classification and Tariffs required transportation of platinum at actual value. The Interstate Commerce Act proscribed any limitation of liability unless authorized by the Interstate Commerce Commission, which is absent in this case. It is not the function of this Court to permit such a limitation but solely that of the Commission as prescribed by the Act.

The liability of the petitioner was that imposed by the Interstate Commerce Act (40 U. S. C. A., Sec. 20 (11)) as measured by the contract of carriage so far as it was valid under the Act. *Georgia, etc. R. Co.* v. *Ward*, 244 U. S. 383, 387; *Georgia, Fla. & Ala. Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 197. The contract of carriage consists of the *appropriate* receipt, if issued by the petitioner (which was not done in this case), and the lawful Classification and Tariff on file with the Commission and in effect on the date of shipment. *Burke* v. *Union Pacific R. R. Co.*, 226 N. Y. 534, affirmed sub nom. *Union Pacific R. R.* v. *Burke*, 255 U. S. 317; *American Railway Ex. Co. Inc.* v. *Lindenberg*, 260 U. S. 584; *Louisville & N. R. R. Co.* v. *Chatters*, 279 U. S. 320, 331; *Davis* v. *Henderson*, 266 U. S. 92. The Classification and Tariff filed with and approved by the Commission have the force of a statute and cannot be varied under any pretext. No party can lawfully depart from them and no act of either party,

intentional or unintentional, can create any rights or responsibilities other than or different from those fixed by the filed Classification and Tariff. *Louisville & N. R. R. Co.* v. *Maxwell*, 237 U. S. 97; *Dayton Coal & Iron Co., Ltd.* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 239 U. S. 446; *Burke* v. *Union Pacific R. R. Co., supra*, 543; *Pennsylvania R. R. Co.* v. *Int. Coal & Mining Co.*, 230 U. S. 184, 187; *American Railway Ex. Co. Inc.* v. *Lindenberg*, 260 U. S. 584. "By these schedules the carrier was bound, and to them it was limited, in contracting for traffic." *Southern Ry. Co.* v. *Prescott*, 240 U. S. 632, 638; *Union Pacific R. R. Co.* v. *Burke*, 255 U. S. 317, 319. The Classification, Tariff and Receipt form were all prepared and printed by petitioner. "* * *, where there is any ambiguity in the terms of the contract prepared by one of the parties 'it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against' such party (citing)." *Rentways, Inc.* v. *O'Neill Milk & Cream Co.*, 308 N. Y. 342, 348.

Petitioner gives prominence to the words "all property" in Rule 1(a) and "property" in Rule 13(a) of the "Merchandise Classification" which it considers and extends entirely out of context. Rule 1(a) expressly provides that the First Class Package rates "are applicable * * *, unless otherwise hereinafter provided" and it is specifically "otherwise provided" by Rule 43-B(h) of the "Money Classification" (Plf's Ex. 4-A, Supp. =23, p. 9) that "Precious Metals * * * will be charged for at Gold Coin Rates named in Rule 41-B(b), page 7, of this supplement on actual value". Even a ready reading of the Rule 1 makes it obvious that it relates entirely to the "Class" and "Commodity" package or pound rates contained in a separate Tariff (Deft's Ex. B) applicable only to ordinary merchandise. That Rule 1 applies only to ordinary merchandise is established by the following provisions contained in petitioner's Official Express Clas-

sification #36, I. C. C. No. 8200, issued January 16, 1956 (less than a month subsequent to the shipment here involved) and effective March 1, 1956:

"MERCHANDISE CLASSIFICATION RULES.

RULE 19. DEFINITIONS.

* * * * * *

(i) 'Rate' and 'Class' as appearing in the Classification mean as follows:

1. 'Rate' means the specific figure published in Express Tariffs (Class or Commodity) to be used in computing the charge on property transported.

2. 'Class' signifies the numerals (1st Class, 2nd Class, percentages or multiples thereof, etc.) used in this Classification to identify the rate published in Local and Joint Schedules of First and Second Class Express Rates lawfully on file with Regulatory Bodies with which this Classification is filed". (Referring to the package or pound rates published in Deft's Ex. B).

Also in Classification No. 36, Rule 1(a) of the "Merchandise Classification Rules" refers expressly to "this Classification" instead of to "the Classification".

A running reading of Rule 13 of the "Merchandise Classification" and the "Released Rates Order" No. 848 of the Commission reveals that they not only form a part of the "Merchandise Classification" but are expressly limited to shipments of specific ordinary merchandise. It is significant that neither Rule 13 nor the Released Rates Order are referred to in Rule 43-B(h) of the "Money Classification" (Plf's Ex. 4-A, Supp. #23, p. 9) as the statute (49 U. S. C. A., Sect. 20(11)) and the Or-

der expressly require in order that they may be effective. Rule 40-A(e) of the "Money Classification" (Plf's Ex. 4-A, Supp. #23, p. 6) expressly excludes the application of Rule 13 of the "Merchandise Classification" to shipments of precious metals.

Rule 40-A(c) and (d) does not determine the applicable rate. The character of the property—precious metals—platinum—is the determining factor and the only applicable rates for such property are the Gold Coin Rates *on actual value*. This Rule merely provides protective procedures for the benefit of petitioner affording it the right to refuse to accept shipments which do not comply therewith without incurring liability for such refusal. The requirement of subdivision (c) that the shipper mark the actual market value upon the package is merely a protective provision to avoid the penalties imposed upon the carrier by the Act (49 U. S. C. A., Sec. 10) for assessing and collecting charges based upon less than the actual market value. Petitioner's agent did not require it in this case, did not ask for the actual value but merely asked "if the shipper wished to declare a value" and he knew that the shipment contained 50 pounds of platinum having a greater-than-gold value. Petitioner handled the shipment in exactly the same manner and provided the same service it would have accorded the shipment if the actual market value had been marked on the package. It has been specifically found as a fact that this omission did *not* in any way occasion or contribute to the loss. Petitioner may not defend on this ground. *Siebert* v. *Erie R.R. Co.*, 189 App. Div. (N. Y.) 586, 179 N. Y. S. 136, affirmed 232 N. Y. 517, 134 N. E. [illegible].

The requirement of subdivision (d) regarding wax or lead seals does not require either of them to be affixed externally. This provision is merely to protect against pilferage or extraction of contents or a portion thereof in

transit. The loss here was of the entire package, not pilferage or extraction of contents. Hence, this omission, if there was an omission, does not furnish a defense for petitioner. *Siebert v. Erie R.R. Co., supra.* Further, the metal containers were securely sealed with wax; the box containing them was securely nailed and closed and completely sealed with heavy gummed tape and then securely strapped with wire which was mechanically sealed. This requirement was abundantly satisfied.

There was no provision in the Classification or Tariffs which afforded the shipper a choice of shipping under the "Money Classification" or under the "Merchandise Classification". There was no order of the Commission authorizing such procedure and no order authorizing "released values" or limitations of liability on shipments of platinum.

II

The Uniform Express Receipt is not binding in this case.

The Receipt issued by petitioner was introduced into evidence solely as a Receipt and not as the contract of carriage or any part of it (Deft's Ex. A; R. 38-39).

The Receipt was not the proper form of receipt. It was the one provided for ordinary merchandise subject to the "Merchandise Classification". The "Money Receipt" form was required by the "Money Classification" to be used for this shipment. Since it was not in conformity with but contrary to and in violation of the "Money Classification and Tariff" it is invalid and ineffective and the proper Classification and Tariff apply. *American Ry. Ex. Co. Inc. v. Lindenberg,* 260 U. S. 584; *A. C. Lawrence Leather Co. v. Campagnie Generale Trans-*

atlantique, 18 F. 2d 930, cert. denied 274 U. S. 761; *Bragg* v. *Taylor*, 205 App. Div. (N. Y.) 59, 199 N. Y. S. 156, aff'd 236 N. Y. 666.

In all of the cases cited by petitioner at pages 14 and 15 of its petition, the lawful applicable tariffs provided and the Commission authorized by orders, "released values" and rates dependent thereon with attendant limits of liability. The railroad cases all involved ordinary merchandise or livestock, for they are not authorized to transport property of extraordinary value, such as platinum.

The express cases also all involved ordinary merchandise subject to the "Merchandise Classification". None of them involved property subject to the "Money Classification". *Adams Express Co.* v. *Croninger*, a diamond ring (Plf's Ex. 4, p. 60, Items 1525, 1530); *American Ry. Ex. Co. Inc.* v. *Daniels*, ordinary merchandise; *American Ry. Ex. Co. Inc.* v. *Lindenberg*, contents of trunk ordinary merchandise; *Southeastern Exp. Co.* v. *Pastime Am. Co.*, motion picture film (Plf's Ex. 4, p. 64, Items 1935, 1950); *Peyton* v. *Railway Ex. Agcy., Inc.*, ordinary merchandise; *Feinberg* v. *Railway Ex. Agcy., Inc.*, mink coat; *George N. Pierce Co.* v. *Wells Fargo Ex. Co.*, automobiles (Plf's Ex. 4, p. 71, Item 2960).

III

No act of petitioner's agent can vary the rights and responsibilities of the parties as fixed by the proper receipt and the applicable classification and tariffs.

We have already demonstrated this under our Point I. The "Uniform Express Receipt", which was *not* in evidence as a contract of carriage or a part thereof (Deft's Ex. A, R. 38-39), was an improper receipt. The "Money

Classification" required the use of a "Money Receipt." However, the "Money Classification" and the Gold Coin Rates on actual value apply and an interstate common carrier of goods for hire may not limit its liability under the Act (49 U. S. C. A., Sec. 20(11)) without an authorizing order by the Commission and the establishing of a "rate tied to the release." *Hart* v. *Pennsylvania R.R. Co.*, 112 U. S. 331; *Adams Ex. Co.* v. *Croninger*, 225 U. S. 491.

The case of *American Trust Co.* v. *American Ry. Ex. Co. Inc.*, involved a hold-up and robbery of money being conveyed by plaintiff in defendant's truck from its office to defendant's office for shipment. The "Money Classification" at that time provided that such shipments would not be received except at defendant's receiving office. It was held defendant had not received or accepted the shipment and, hence, was not liable. We have no such provision or question here.

The *New York Central* case involved baggage and the *Kansas City Southern Ry. Co.* case involved household goods. In both cases lawful tariffs providing for "released values" and limitation of liability had been filed with and approved by the Commission and authorizing orders issued permitting them. We have no such situation here.

WHEREFORE, your respondent respectfully prays that the petition for a writ of certiorari herein be denied.

Respectfully submitted,

JOSEPH HASKELL,
EMMET L. HOLBROOK,
Counsel for Respondent,
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EMMET L. HOLBROOK,
Of Counsel.

Appendix A

ORDER OF MODIFICATION AND AFFIRMANCE BY NEW YORK APPELLATE DIVISION

At a Term of the Appellate Division of the Supreme Court, held in and for the First Judicial Department, at the Courthouse in the County of New York, on the 19th day of January, 1960.

Present:

HON. CHARLES D. BREITEL,
Justice Presiding,
" BENJAMIN J. RABIN,
" MARTIN M. FRANK,
" FRANCIS L. VALENTE,
" HAROLD A. STEVENS,
Justices.

W. R. GRACE & Co.,
Plaintiff-Appellant,

AGAINST

RAILWAY EXPRESS AGENCY, INC.,
Defendant-Respondent.

An appeal having been taken to this Court by the above named plaintiff-appellant from so much and such part of the judgment of the Supreme Court, New York County, entered January 7, 1959, which limited the recovery of the plaintiff to the sum of $50.00 and awarded

judgment for costs in favor of the defendant against the plaintiff; and said appeal having been argued by Mr. Emmet L. Holbrook, of counsel for the appellant, and by Mr. James V. Lione, of counsel for the respondent, and due deliberation having been had thereon; and upon the decision and opinion of this Court filed herein on December 15, 1959; it is hereby unanimously

ORDERED AND ADJUDGED, that the judgment so appealed from be, and the same hereby is, modified, on the law and the facts, so as to allow recovery in favor of the plaintiff in the amount of $56,117.72, the damages sustained and proved by the plaintiff, with interest and costs, and, as so modified, the said judgment is affirmed with costs of this appeal to the plaintiff-appellant; and it is further unanimously

ORDERED AND ADJUDGED, that the Clerk is hereby directed to enter judgment in favor of the plaintiff in the amount of $56,117.72, with interest from December 20, 1955, plus the costs of this action and the costs of the appeal; and it is further unanimously

ORDERED AND ADJUDGED, that the findings of fact contained in the opinion of the court at Trial Term which are inconsistent with the findings of fact made by this Court in its opinion be, and the same hereby are, reversed and, in lieu thereof, this Court makes the new findings of fact contained in its opinion, which is hereby referred to and made a part of this order.

Enter,

HAROLD A. STEVENS
Justice

Appendix B

OPINION OF THE NEW YORK APPELLATE DIVISION
9 App. Div. 2d (N. Y.) 425, 193 N. Y. S. 2d 780

SUPREME COURT,

APPELLATE DIVISION, FIRST DEPARTMENT.

Dec. 15, 1959.

W. R. GRACE & Co.,
Plaintiff-Appellant,

v.

RAILWAY EXPRESS AGENCY, INC.,
Defendant-Respondent.

Before BREITEL, J. P., and RABIN, FRANK, VALENTE and STEVENS, JJ.
STEVENS, Justice.

Plaintiff appeals from so much of a judgment entered January 7, 1959, after trial, as limited plaintiff's recovery to $50 and awarded costs to defendant.

Briefly the undisputed facts are that the defendant, by one of its drivers, on December 29, 1955, at the vaults of the Chase Manhattan Bank, 535 5th Avenue, New York City, picked up a shipment of crude platinum in a box weighing approximately 50 pounds directed to Bishop & Co., Malverne, Pa. There was no wax or lead seal on the outside of the box as required for precious metals. Neither the full value nor the identity of the contents was written

thereon, nor was the driver told the actual value of the shipment. When the driver asked the contents of the package he was informed that it contained platinum, and a valuation of $50 was declared by the shipper. The driver gave an ordinary merchandise freight receipt upon which he wrote the word "Platinum." This was a prepaid shipment for which the driver collected $2.90, the ordinary freight rate. The receipt by its terms limits liability to $50.

The driver entered this shipment in his value book, a book in which any shipment which has a declared value of $50 per pound or more is entered, and subsequently delivered the same to defendant's express depot in Long Island City, where he received a signature receipt from one O'Connor, defendant's value man. O'Connor testified by deposition that he questioned the driver as to what made this shipment of value, there being no seals on the box, and was told "it's platinum. I have it written on the sheet."

Thereafter O'Connor took the shipment to the value room, delivered it to Mitchell Robinkoff, the money clerk, and obtained a signature receipt from him. O'Connor told Robinkoff that he (O'Connor) had been told by the driver that the box contained platinum, and the sheet signed by Robinkoff had the word "platinum" written thereon.

Under the rules and practices of the defendant, any shipment leaving the value room was supposed to be signed for, but no receipt was obtained for this shipment which was never delivered.

Plaintiff brought suit to recover the full value of the platinum and offered proof to establish its claim in the

amount of $56,245.75. The defendant admitted acceptance of the box, the giving of a receipt, collecting $2.90, and alleged the shipper declared a value of $50. As a separate defense defendant alleged that the shipment was delivered and received "only under and pursuant to and subject to the terms and conditions of a special contract in writing for the carriage of the same" entered into at the time of delivery and acceptance of the package. Further, that the terms and conditions of such contract were established, filed and posted as required and authorized by Act of Congress and orders of the Interstate Commerce Commission. And by the terms of the special contract in writing its liability was limited to $50, the value placed upon the property. Recovery was allowed, after trial, but limited to $50. The defendant has not appealed so the question of liability is not before us.

Plaintiff on this appeal urges that the defendant is liable for the amount of $56,117.72 (value less unpaid transportation charges of $128.03) with interest, under its applicable official money classification and rates. It contends that defendant did not establish a valid contractual limitation of liability to $50.

There was some testimony that the shipper had declared a lower rate because it carried outside insurance on the metal. There is no dispute that there is a different rate for shipment of ordinary merchandise and money or precious metals. Had the rate for the classification which includes platinum been applied, the transportation charge would have been $130.93, instead of $2.90, the amount actually charged.

The driver who collected the shipment was not armed nor, according to his testimony, had he ever driven a

truck which picked up materials subject to the money receipts. He had, however, from time to time picked up values which were entered in his value book. He testified that he knew platinum was a precious metal equivalent to a greater-than-gold value.

We are faced with the question whether a shipper is entitled to recover the full value for nondelivery of a shipment, where such shipper knowingly failed to package properly or declare its full value and where the transportation charge paid was less than that applicable to precious metals, but where the identity of the contents was given the common carrier at the time of delivery, and such carrier thereafter recognized and treated the shipment as a valued one in accordance with its established procedure.

The defendant, being a common carrier, is prohibited from unjust discrimination in rates or rebates between shippers (49 U.S.C.A. § 2), or the giving of undue or unreasonable preference or advantage to any company, firm or corporation (49 U.S.C.A. § 3(1)). Undue or unreasonable preference does not refer solely to facilities but applies also to discrimination in rates.

[1] Every common carrier, as that term is defined in the Interstate Commerce Act (49 U.S.C.A. § 1), is required to file with the Commission and publish a schedule of rates, fares, freight classification, etc. (49 U.S.C.A. § 6). That was done in this case. Since this was an interstate shipment and Congress has legislated thereon, the law applicable is governed by Federal statutes and decisions. Adams Express Co. v. Croninger, 226 U.S. 491, 33 S. Ct. 148, 57 L. Ed. 314. It is provided that no carrier shall "charge or demand or collect or receive

a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith * * *" 49 U.S.C.A. § 6(7).

[2] A private accommodation by agreement in an interstate shipment will not take precedence over the provisions of the uniform bill of lading approved by, and filed with the Interstate Commerce Commission, so as to relieve a defendant from liability where loss due to theft occurred. This is true though the act done was for the special accommodation of the shipper (Siebert v. Erie Railroad Co., 189 App. Div. 586, 179 N.Y.S. 136, affirmed 232 N.Y. 517, 134 N.E. 553) and the defendant did not issue or deliver to the shipper any bill of lading.

In the case before us defendant filed its Official Express Classification with the Commission as required. Examination of the document reveals that it contains two major classifications, i.e., "Merchandise Classification" and "Money Classification." No provision for the receipt or transportation of precious metals appears under the "Merchandise Classification" but such provision appears under "Money Classification."

Under "Money Classification" it is provided that a money receipt must be given for all matter received, and that shipments must not be received for transportation in the money classification "unless the actual or market value is declared by the shipper and marked by him upon the package." Where the shipment contains precious metals it must be sealed in a certain manner. Provision is made also for mixed packages containing precious metals (Rule 40-A). As a precious metal, platinum was to be charged for at the gold coin rates (Rule 43(h)).

[3] The tariff or rate schedule thus filed became the rate required or imposed by law and became as well the law between the shipper and the carrier, unless and until the Commission determined the rates unreasonable and unjust, and the carrier was prohibited from departing from the tariff. Tariffs filed and published become a part of the contract of carriage. Cf. Burke v. Union Pacific R. Co., 226 N.Y. 534, 124 N.E. 119, affirmed sub nom. Union Pacific R. Co. v. Burke, 255 U.S. 317, 41 S.Ct. 283, 65 L.Ed. 656; New York & Honduras Rosario Mining Co. v. Riddle Airlines, 3 A.D.2d 457, 162 N.Y.S. 2d 314, affirmed 4 N.Y.2d 755, 172 N.Y.S.2d 168. A published tariff, so long as it is in force, is to be treated as a statute, binding upon railroad and shipper alike. Pennsylvania R. Co. v. International Coal Mining Co., 230 U.S. 184, 197, 33 S. Ct. 893, 57 L.Ed. 1446. In that case a shipper of coal which had paid the lawful rate, sought to recover as damages the difference between the amount it received as rebates and the larger sums it claimed had been given other shippers by the carrier. The court reversed a judgment for the shipper and awarded a new trial on the ground that under the statute there was no presumption of loss on the part of the shipper and such pecuniary loss had to be proved. A mere showing of the difference in the amounts of the rebates was not sufficient. The court there recognized, however, the principle of liability.

It has been held that a shipper, by receiving and acting upon an express receipt signed only by the carrier, assents to its terms and that such receipt does not require the shipper's signature (American Railway Express Co. v. Lindenburg, 260 U.S. 584, 43 S.Ct. 206, 67 L.Ed. 414). In that case recovery for damage to the

contents of a trunk was limited to the valuation specified upon the receipt, the shipper being estopped from asserting a higher valuation. Moreover, the receipt there was a proper one because the subject matter was covered by the proper classification, i. e., the merchandise classification. The court pointed out "[T]he transportation charges were in conformity with the tariff, and the receipt issued, insofar as the limitation of liability is concerned, was in substantial accord with the authorized receipt." 260 U.S. at page 588, 43 S.Ct. at page 208. In the case before us the transportation charges were not in conformity with the tariff filed, nor was the carrier unaware of the contents of the package. The receipt, therefore, was not a proper one. Moreover, it deviated from the filed tariff by its failure to include the correct value charge.

In Adams Express Co. v. Croninger, 226 U.S. 491, 33 S.Ct. 148, 57 L.Ed. 314, one of the questions before the court was whether the operation and effect of the contract for an interstate shipment, as evidenced by the receipt, was governed by the local law of the State or the acts of Congress regulating interstate commerce. The court held federal legislation controlled. In the Adams case the answer, to which the plaintiff demurred, alleged, *inter alia*, that the package was sealed and that the defendant did not know its contents or value, that its rates and charges were filed, that plaintiff knew the charges were based on weight-value, and that the receipt issued showed no value. The demurrer was sustained in the trial court and judgment for $137.12, the full value of the ring with interest, was given the plaintiff. On appeal the judgment was reversed with the direction to overrule the demurrer. The shipper was estopped to claim

a higher value than that set forth in the receipt. It should be noted that the demurrer in effect admitted that certain provisions were in the filed tariff and accordingly the receipt given would seem to have been proper under the circumstances.

The statute provides that a common carrier is liable for the actual loss or damage to property caused by it. There are exceptions where the carrier has been authorized or required by the Commission to establish and maintain rates dependent upon value declared in writing by the shipper or agreed upon in writing as the released value of the property, which declaration or agreement may limit liability and recovery to an amount not exceeding the value so declared or released. In such cases the Commission is empowered to make such order as would be just and reasonable under the circumstances and conditions surrounding the transportation. 49 U.S.C.A. § 20(11). No such exceptions are applicable here. Released Rates Order No. 848, effective March 1, 1929, applies to "Merchandise, other than ordinary livestock"; etc., and grants authority "to establish and maintain released rates for the transportation by express of furniture not boxed * * * and of other property as specified in Rule 13, paragraphs (a), (b) and (c) of said Official Express Classification."

Examination of the paragraphs referred to under Rule 13, as they appear in the "Merchandise Classification", particularly when contrasted with the pertinent provisions of Rule 40-A of the "Money Classification" supports this conclusion.

The principle would seem to be "that the charge should bear some reasonable relation to the responsibil

ity, and that the care to be exercised shall be in some degree measured by the bulk, weight, character, and value of the property carried." Adams Express Co. v. Croninger, 226 U.S. 491, 510, 33 S.Ct. 148, 153. In other words, the discrimination or preference in rate differentials which is prohibited is that which is unreasonable or unjust when measured by the transportation standard. Cf. United States v. Illinois Central R. Co., 263 U.S. 515, 44 S.Ct. 189, 68 L.Ed. 417.

In light of the knowledge of the defendant of the contents of the package in this case, the defendant having some appreciation of its value, though not necessarily its full value, it can fairly be said that the charge bore no reasonable relation thereto but was in fact discriminatory or preferential (cf. Siebert v. Erie Railroad Co., 189 App.Div. 586, 179 N.Y.S. 136, affirmed 232 N.Y. 517, 134 N.E. 553) and, as pointed out, the receipt given here was not a proper one. This should have been a money receipt. There was no authorization contained in the filed schedules for the charge made here.

A question similar to that before us was involved in New York & Honduras Rosario Mining Co. v. Riddle Airlines, supra, which had to do with the liability of a connecting or terminal airline carrier, which did not charge the plaintiff in accord with the tariff provision. The court pointed out "The rights and duties of shippers and carriers under the Civil Aeronautics Act are similar to those imposed by the provisions of the Interstate Commerce Act" and that "[T]ariffs filed by an air carrier under this Act are equally as binding as those filed under the Interstate Commerce Act" (3 A.D.2d at page 462, 162 N.Y.S.2d at page 319). The defendant was

held liable for the full value of lost bullion despite a declared or released value of $100 in the air waybill. There, as here, the defendant knew what it was carrying.

As pointed out, the agreed or released valuation should bear a reasonable relation to the rate charged for transportation, and an essential and intelligent choice of rates on the part of the shipper should affirmatively be made to appear, i. e., as between a lower and higher rate offered and obtainable. This, of course, is in the absence of a sanction contained in the filed classifications and schedules, approved by the Commission, which would permit the parties to fix the agreed valuation as a limitation of liability (cf. Burke v. Union Pacific R. Co., 226 N.Y. 534, 124 N.E. 119, affirmed sub nom. Union Pacific R. Co. v. Burke, 255 U.S. 317, 41 S.Ct. 283, 65 L.Ed. 656).

[4] Where a legal freight charge has been fixed by a schedule of rates duly published, filed and posted in accordance with Acts of Congress, a consignee, standing in the place of the owner, is bound to pay the carrier the lawful and correct charges, not those illegally or erroneously computed. And a carrier may maintain an action for the difference or balance. Pennsylvania R. Co. v. Titus, 216 N.Y. 17, 109 N.E. 857, L.R.A.1916E, 1127. Such rate when established becomes by virtue of the Interstate Commerce Act "arbitrary, immutable by the agreement, mistake, or artifice of the parties, and not to be deviated from." 216 N.Y. at page 22, 109 N.E. at page 858. If the carrier is not estopped to recover the legal rate where there has been mistake, error or even illegal computation, there seems little reason why the shipper should be estopped to recover the full value in like circumstances.

Appendix B

[5] On the record before us there is no basis for an estoppel against the shipper, for the carrier was not misled, and its measure of recovery is the loss actually sustained and proved. The carrier is bound by the knowledge of its agents or employees when they receipted for the metal, recognized its identity by writing the word "Platinum" on the receipt, and evidenced some recognition of its value by the care in handling the same. The special accommodation, if such it be termed, was not authorized, and the deviation from the published schedules, without warrant, should not be sanctioned. Emily Shops, Inc. v. Interstate Truck Line, 207 Misc. 557, 139 N.Y.S.2d 561, affirmed 1 A.D.2d 667, 148 N.Y.S.2d 915, affirmed 2 N.Y.2d 405, 161 N.Y.S.2d 46; Elgart & Sons, Inc. v. Peoples Express Co., Inc., 11 Misc.2d 499, 172 N.Y.S.2d 661.

Accordingly, the judgment appealed from is modified on the law and on the facts so as to allow recovery in the amount of $56,117.72, the damages sustained and proved by the plaintiff, with interest and costs to plainfiff-appellant.

Judgment unanimously modified on the law and on the facts so as to allow recovery in the amount of $56,117.72, the damages sustained and proved by the plaintiff, with interest and costs to plaintiff-appellant. Settle order.

All concur.